

<b>In re JOSEPH A. PENCE</b>	)	<b>Chapter 7 Proceedings</b>
<b>and LYNN FLANERY PENCE,</b>	)	<b>Case No. 04-07794-PHX-CGC</b>
	)	
	)	<b>UNDER ADVISEMENT DECISION</b>
	)	<b>RE: OBJECTIONS TO SALE AND</b>
<b>Debtors.</b>	)	<b>MOTION TO STAY SALE</b>

The Trustee presents two arguments in response to Ms. Pence’s objection: 1. that neither the partnership nor any of the partners timely exercised their option to purchase; and 2. that under the holding of *In re Cutler*, 168 B.R. 275 (Bankr. D. Ariz. 1994), the Trustee has the right and obligation to sell the partnership interest regardless of any provision in the

1 Partnership Agreement purporting to limit or modify that right because 11 U.S.C. section  
2 363(l) invalidates restrictions based on insolvency that effect a modification or a forfeiture of a  
3 debtor's interest in property. This latter issue, however, need not be addressed here because  
4 the partnership's and partners' right to purchase the property expired by its terms.

5 The parties consistently refer to the option to purchase in Paragraph 12 as a right of  
6 first refusal: The language of the Partnership Agreement is quite clear that this is an option to  
7 purchase. The distinction is important. A right of first refusal means that the partnership or  
8 its partners would have the right to *match* an offer of a third party purchaser identified by the  
9 withdrawing partner – here the Trustee by way of Debtor's bankruptcy. Presumably, as  
10 argued by Ms. Pence, the price, terms and identity of the buyer would not be known until after  
11 the Trustee finalized its sale procedures. The option to purchase, however, is different and  
12 does not grant the partnership or the partners the opportunity to match an offer brought to the  
13 table by a third party through the withdrawing partner or, as in this case, the Trustee. Instead,  
14 the option here has an express time limit on it and does not rely on the presentation of a third  
15 party purchaser. The option specifically grants the partnership and its partners two months  
16 from notice of the withdrawing partner's intent to withdraw to make an offer.

17 In this case, Debtors filed for bankruptcy on May 4, 2004. There was no election to  
18 purchase within the two months following Debtors' filing. While there is some question as to  
19 whether the partnership and remaining partners were properly put on notice that the time for  
20 making such an election had begun running, they clearly were on notice once the Trustee  
21 sought offers from the partnership and its partners by letter dated February 10, 2005. At this  
22 time, the partnership and partners were aware of the bankruptcy and that a withdrawal from  
23 the partnership had been effectuated under the terms of the Partnership Agreement. No  
24 election to purchase was received within the two months following the February 10, 2005,  
25 letter. In fact, no offer from the partnership or its partners was forthcoming until March 3,  
26 2006, – over a year later.

27 At that point, the partnership and the partners were simply bidders like everyone else.  
28 Their favored position no longer existed. The sale of the interest on April 8, 2006, went to the

1 highest bidder, which was not the partnership or any of its partners. They elected not to bid.

2 Therefore, for the foregoing reasons, the Ms. Pence's objection is overruled and the  
3 sale is confirmed. Counsel for the Trustee is to lodge a form of order consistent with this  
4 decision for the Court's signature.

5 So ordered.

6 **DATED:** June 12, 2006

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8   
9 CHARLES G. CASE II  
UNITED STATES BANKRUPTCY JUDGE

10 **COPY** of the foregoing served by the BNC to:

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